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In The

Supreme Court of the United States

October Term, 1997

MARY McCARTHY, et al.,

Petitioners,

vs.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. §1291 when the basis for dismissal is that the claims must be arbitrated?

2. Whether the Federal Arbitration Act effects a partial repeal of 28 U.S.C. §1291 by prohibiting appeal of certain final judgments of district courts when they are based upon the holding that the plaintiffs' claims must be arbitrated?

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I. INTRODUCTION

None of Respondents' reasons for denying the Petition for Certiorari withstands scrutiny. While Respondents *concede* that there is a split among the circuits regarding the Questions Presented, they then devote the bulk of their Opposition to arguing the *merits* of the issue. There plainly are two sides to that issue, as illustrated by the circuit split itself, but there is no debating the split's existence.

Beyond arguing the merits, Respondents' strained assertion that resolution of the circuit split is unimportant will not wash. Litigants are entitled to and expect clear and consistent rules of appealability. Given the circuit split, only this Court can provide the certainty that litigants and the courts are entitled to. Ambiguity about appealability may lead to premature or, worse yet, forfeited appeals.

II. ARGUMENT

A. Respondents' Opposition Concedes The Circuit Split

In a breath of refreshing candor, Respondents' Opposition admits there exist grounds for this Court to grant the Petition for Writ of Certiorari: "There is a difference of opinion on this issue among the Circuits." Opp. 5; *see also* Opp. 12 ("there is concededly some intercircuit conflict on this issue").[1]

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[1] Respondents' Opposition to Petitioners' Petition for a Writ of Certiorari is referenced herein as "Opp. ___." The

Having conceded the split, Respondents then attempt to claim "majority" status for their view by citing to several decisions that ostensibly support the *per se* nonappealability of final judgments ordering arbitrations. *See* Opp. 9-10. The problem is, while Respondents' cases deny review, that is the point at which any semblance of a "majority" ends. Three of Respondents' circuits find nonappealability because the judge specifically *retained control* over the action while sending the parties to arbitration.[2] Only the remaining four reject the significance of a *final dismissal* on the appealability of an arbitration order – the issue before this Court – instead, finding dispositive an artificial "embedded/independent" distinction.[3] In contrast, each of Petitioners' three circuits utilizes a narrow analysis concentrating on the *finality* of the decision below.[4]

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original petition is referenced as "Pet. ___," and its Appendix as "Pet. App. ___."

[2] *See Napleton v. General Motors Corp.*, 138 F.3d 1209, 1214 (7th Cir. 1998) (district court had dismissed case *without prejudice*); *Seacoast Motors v. Chrysler Corp.*, No. 97-1694, 1998 U.S. App. LEXIS 9699, at *6 (1st Cir. May 13, 1998) ("embedded" versus "independent" distinction not dispositive; dismissal of action *without prejudice* is); *Ermenegildo Zegna Corp. v. Lanificio Mario Zegna, S.p.A.*, 133 F.3d 177, 183 (2d Cir. 1998) (district court specifically *granted stay*, and "much may remain for [it] to do following the arbitration").

[3] *See McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997), *petition for cert. filed* (May 26, 1998); *In re Pisgah Contrs., Inc.*, 117 F.3d 133 (4th Cir. 1997); *Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994).

[4] *See Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991); *Arnold v. Arnold Corporation-Printed Communs. for*

Thus, Respondents' "majority" is more of a *plurality* – a 4-3-3 split reflecting total confusion in the lower courts. Only this Court can dispel this confusion surrounding the interplay between the final judgment rule and the Federal Arbitration Act.

B. Resolution Of The Circuit Split Is Important To Litigants

Unable to deny the rift among the circuits, Respondents denigrate the impact these unsettled questions have on litigants. Distilled to its essence, Respondents' position is that even if several circuits have incorrectly interpreted the interplay between two federal statutes and continue to issue "wrong[ly]" decided opinions, that result is "unimportant." Opp. 15-16. Respondents are wrong.

The class in the underlying action comprises elderly victims allegedly cheated out of millions. They now face the specter of spending an estimated $3.75 million in the aggregate merely to exhaust their arbitral remedies so as to preserve their right to someday appeal the lower court's erroneous ruling. Pet. 8. Respondents' cavalier retort that Petitioners "do not suffer any prejudice" from the unsettled law, Opp. 15, ignores the realities of Petitioners' plight.

Even more important, resolution of the conflict is necessary to rationalize appealability doctrine for all litigants. Should the circuit split remain unresolved, litigants

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Business, 920 F.2d 1269, 1275 (6th Cir. 1990); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 797 (10th Cir. 1995).

will enter the courts without the benefit of clear rules regarding finality and appealability of arbitration orders. Pet. 17-18. Appealability will not depend upon settled jurisprudence, but rather, upon the happenstance of the *location* of the circuit in which the action is filed – or in circuits without a rule, upon a guess as to *which* rule that circuit will embrace. As the law now stands, a final judgment coupled with an order to arbitrate in the Third, Sixth, or Tenth Circuits *will be* immediately appealable; an identical order, entered in the Fifth, Eighth, or Ninth Circuits *will not*. As to the remaining circuits – who can say with certainty? Respondents' claim that this Court's resolution of the fractured and confused jurisprudence among the lower courts will have no meaningful impact rings hollow. Only this Court, the "ultimate expositor of the meaning of the federal constitution and statutes," can resolve the rift among the circuits.[5]

Attempting to further bolster their "unimportance" characterization, Respondents gamely assert that parties moving for dismissals and arbitration will simply "be more vigilant" in seeking *stays* in the district court, supposedly ensuring that orders compelling arbitration will *always* be labeled interlocutory and unappealable. Opp. 16. Respondents' tidy scenario crumbles beneath the weight of the varied analyses found among the circuits: while a few appealability decisions *do* turn on whether a

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[5] Arthur D. Hellman, *The Supreme Court, The National Law, And The Selection Of Cases For The Plenary Docket*, 44 U. Pitt. L. Rev. 521, 522 (1983).

stay has been granted,[6] others focus on whether an arbitration claim is deemed "embedded" or "independent,"[7] several query whether the district court's dismissal was "without prejudice,"[8] and some simply ask whether the district court's decision was "final."[9] Moreover, there is no guarantee that a stay (rather than a dismissal) will issue merely because it is requested.[10] Federal judges have been known to show more independence than that.

C. The Rule In The Third, Sixth And Tenth Circuits Is Correct And The Decision Below Should Be Reversed

Although the merits are not essential to a grant or denial of certiorari, Respondents' impassioned defense of the decision below calls for a brief rebuttal.

By its plain language, Section 1291 mandates that the courts of appeals have jurisdiction over appeals of all *final decisions* of the district courts.[11] Respondents cannot deny the finality of the judgment below: the district court

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[6] *See, e.g., Armijo*, 72 F.3d at 797.

[7] *See, e.g., Gammaro*, 15 F.3d at 95.

[8] *See, e.g., Napleton*, 138 F.3d at 1212-14; *Seacoast*, 1998 U.S. App. LEXIS 9699, at *6.

[9] *See, e.g., Nationwide Ins.*, 953 F.2d at 46; *Arnold*, 920 F.2d at 1275.

[10] *See, e.g., McCarthy v. Providential Corp.*, No. C-94-0627 FMS, 1994 U.S. Dist. LEXIS 10122, at *27 (N.D. Cal. July 18, 1994) ("there is no reason to stay these proceedings pending the arbitrator's decision"); *see also Napleton*, 138 F.3d at 1210; *Arnold*, 920 F.3d at 1273.

[11] 28 U.S.C. §1291.

declared that "*none* of plaintiff's claims remain to be resolved by this court," *dismissed* the action, issued a *separate* judgment dismissing the case, and specifically ordered the clerk to *close the file*. Pet. App. 39a-41a. Because there was nothing left for the district court to do, its decision was final and appealable. *Arnold*, 920 F.2d at 1274-75.[12]

Finally, Respondents claim Petitioners seek "two bites at the same appellate apple." Opp. 14. On the contrary, Petitioners seek to avoid the waste and delay of plodding through thousands of *individual*, expensive arbitrations, only to be told later that the compelled arbitration was incorrect and that they must litigate their claims all over again in district court. If Petitioners obtain review at this stage, the collateral estoppel doctrine ensures that neither party will get a second "bite" at that "apple." *Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 328-29 (1971).

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[12] Arguing against finality, Respondents cite to a federal practice treatise and assert that a "flexib[le]" interpretation of Section 1291 is needed to fulfill the "pro-arbitration goals" of the FAA. Opp. 14-15. Flexibility should not override the clear dictates of Section 1291. This Court has long held that where a statute's language is *plain*, " 'the sole function of the courts is to enforce it according to its terms.' " *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Respondents would be hard pressed to find plainer language than, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. §1291.

III. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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